

No. 4003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. W. BRAINARD, as trustee of the estate of  
PACIFIC CO-OPERATIVE LEAGUE STORES (a  
corporation, bankrupt),

*Petitioner,*

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O.  
LLOYD, FRANK W. LESNET, BERTHA A. BUR-  
GESS, EDWARD BURGESS, W. A. GARA, T. MC-  
KIERNON, CLARENCE S. KING, and J. H.  
PHILLIPS,

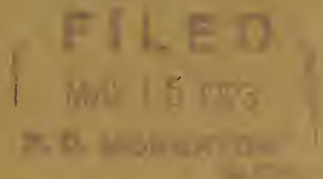
*Respondents.*

BRIEF FOR PETITIONER.

JOSEPH KIRK,

CLARENCE A. SHUEY,

*Attorneys for Petitioner.*





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## BRIEF FOR PETITIONER.

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### Statement of the Case.

The bankrupt was engaged in buying and selling merchandise throughout the Pacific Coast States and conducted more than thirty-seven (37) branch stores in this territory, a complete statement of the character of which business is contained in the Referee's certificate and stipulation of facts therein referred to and appearing in Transcript Ex. "A"

p. 9 and Ex. "C" p. 19. Said bankrupt had in charge of each of these stores a manager. The respondent managers have filed with the Referee in Bankruptcy claims against the bankrupt's estate asserting right of priority payment under the provisions of Section 64b of the Bankruptcy Act. The trustee contested their right to priority and after hearing the Referee allowed their respective claims as entitled to priority. (Tr. Ex. "B" p. 17.)

Section 64b (4) of the Bankruptcy Act provides as follows:

"The debts to have priority \* \* \* and to be paid in full out of bankrupt estates, and the order of payment shall be \* \* \* wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300.00 to each claimant."

The trustee filed with the Referee his petition for a review by the District Court of the order allowing these claims priority and the Referee prepared and filed in the District Court his certificate on review wherein are set forth the facts adduced at the hearing with the stipulation of facts presented thereupon as aforesaid.

A hearing was had before the District Judge and an order made affirming the order of the Referee. (Tr. p. 29.) The matter is now before the Circuit Court of Appeals upon the trustee's petition for a revision of the order of the District Court.

### **Specification of Error Relied Upon.**

The Referee and the District Judge erred in allowing the claims of respondents as entitled to priority under Section 64b of the Bankruptcy Act for the reason that said respondents were not workmen, clerks, traveling or city salesmen, or servants within the meaning of Section 64b (4).

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### **Brief of the Argument.**

The manager of a corporation employed to perform services as herein set forth is not entitled to priority.

- Collier on Bankruptcy, 11th Ed. p. 1009;
  - In re Blessing v. Blanchard, C. C. A. 9th Circuit, 35 A. B. R. 135, 223 Federal 35;
  - In re Ladies Shoppe Inc., 49 A. B. R. 268, Sept. 22, 1922, D. J. Delaware;
  - In re Greenberger, 30 A. B. R. 117, 203 Fed. 583;
  - In re Albert O. Brown, 22 A. B. R. 496, 171 Fed. 281;
  - In re Crown Point Brush Co., 29 A. B. R. 638, 200 Federal 889.
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### **Argument.**

A manager, such as claimants herein, is not entitled to priority. Collier on Bankruptcy, 11th Ed. p. 1009 says:

“The words are used in their popular sense, and should be construed to mean just what they

are popularly understood to mean; that is, only those who work, labor, or serve in a more or less subordinate capacity. Dictionaries should be consulted as well as cases.”

In the case of *Blessing v. Blanchard, et. al.*, C. C. A. 9th Circuit, 35 A. B. R. 135, 223 Federal 35, this Court in reversing the Referee whose decision is now before this Court on review and also the Honorable Judge Dooling of the District Court, said:

“The word ‘servant’ often has a broad and inclusive meaning and in a sense it may be said to include all employees in the service of another, and also the officers of corporations. It is very clear, however, that it is not used in that sense in the section under consideration. Although the word ‘servant’ is broader than the term ‘house servant’ as used in the act of 1867, it was not intended by its use in the act of 1898 to include all employees; otherwise, there would have been no necessity for a specific mention of workmen or clerks or salesmen. We think the word ‘servant’ should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. *We do not think it includes the manager of a business notwithstanding that he may also have rendered services as a salesman.*”

In the case of *Ye Ladies Shoppe, Inc.*, 49 A. B. R. 268, contained in the advanced sheets of February, 1923, Volume 49 A. B. R. Number 4 at page 269, a petition to review an order of the Referee in Bankruptcy denying priority to a claim amounting to two hundred and three dollars and twenty-five

cents (\$203.25) was filed. The Referee in denying priority, held that the claimant was not within the class of persons entitled to priority. The Court said:

“In considering whether the debt due claimant is entitled to priority of payment, I shall assume, without deciding, that the fact that a claimant is an officer and director of a corporation neither disables the corporation from employing him as a workman, clerk, traveling or city salesman, or servant, nor disentitles him to priority for wages due for services performed in any of the latter capacities. In *re H. O. Roberts Co.* (D. C., Minn.), 27 Am. B. R. 437, 193 Fed. 294; in *re Swain Co.* (D. C., Cal.), 28 Am. B. R. 66, 194 Fed. 749; In *re Eagle Ice & Coal Co.* (D. C., Pa.), 39 Am. B. R. 184, 241 Fed. 393. The question remaining is whether the wages due one employed as “manager and buyer and saleswoman” are entitled to priority. It is now well settled that wages due for services rendered as manager of a corporation are not entitled to priority of payment. In *re Bonk* (D. C., Mich.), 46 Am. B. R. 503, 270 Fed. 657; *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 195, 223 Fed. 35, 138 C. C. A. 399, Ann. Cas. 1916B, 341; In *re Greenberger* (D. C., N. Y.), 30 Am. B. R. 117, 203 Fed. 583; In *re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882; In *re Albert O. Brown & Co.* (D. C., N. Y.), 22 Am. B. R. 496, 171 Fed. 281; In *re Grubbs-Wiley Grocery Co.* (D. C., Mo.), 2 Am. B. R. 442, 96 Fed. 183.

I think it clear that the contract under which claimant performed her services was an entire contract, and not a severable or divisible one, and that compensation for her services in the several capacities thereunder may not be apportioned. 6 R. C. L. p. 858; 7 A. & E. Enc.



of Law (2d Ed.), p. 95 et seq.; Elliott on Contracts, Section 1543. However that may be, no apportionment was made or attempted to be made, in the proof of claim or in the agreed statement of facts, between what is due to her for her services as manager and what is due to her for her services as buyer and saleswoman. Consequently, as she is not entitled to priority for the wages due her as manager, and as her claim may not be apportioned, or at least has not been apportioned, she has failed to establish a right to priority with respect to any part of her claim. In re Swain Co. (D. C., Cal.), 28 Am. B. R. 66, 194 Fed. 749, relied upon by the claimant, no portion of the claim was for services rendered in an employment not embraced within section 64b (4) of the Bankruptcy Act.

The order of the referee must be affirmed."

In the case of Greenberger, 30 A. B. R. 117, 203 Federal 583:

"This manager kept the accounts and managed the business, except that he did not hire or discharge help or pay the bills for goods, as a rule. However, he was the manager, and managed the business. He had a regular salary as such manager. \* \* \* In addition to the performance of his duties as manager he sold goods and kept the store clean for the reason that he would not turn this duty over to the lady clerks. It appears fairly from the evidence that the clerical work performed by him as well as the work done in keeping the store clean, was merely incidental to the performance of his duties as manager of the store. He was not employed as a cleaner or workman or clerk, and so far as appears all that he did in selling goods and cleaning the store was voluntary on his part. The fact that, as inci-



dent to the performance to his duties as general manager of this store he kept it clean and did some clerical duty does not change the character of his employment. He was not employed to do that work but to manage the business and he was paid for managing it and not for performing such menial services as he did perform as incident to the management. The claim is for salary and for salary as manager not for services as a clerk or general workman and compensation as such. \* \* \* It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority, for the reason that he incidentally sweeps the floor, dusts the counter and sells the goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the Bankruptcy Act giving priority to workmen, clerks, salesmen, and servants."

In the case of Albert O. Brown, 22 A. B. R. 496, 171 Federal 281:

"It is quite clear that Olmsted is not a 'workman', nor is he a 'servant' because the term does not include all instances of the formal relation of master and servant. \* \* \* The only thing left that he could be, therefore, is a 'clerk'. No one would think of calling the manager in charge of the Chicago branch of a broker's office a 'clerk'—he himself least of all. Whether or not he is employed for 'wages' he is much distinguished from a clerk."

In the case of Crown Point Brush Co., 29 A. B. R. 638, 200 Federal 889:

"A person might be employed by a corporation to do service as general manager or assist-

ant general manager for six hours each day and as a common laborer or workman the balance of the day; but it would be incumbent on the claimant, in order to establish priority as a workman, to establish that he was employed, hired in the dual capacity, and show how much of his agreed compensation, wages, or salary was for his services as workman."

Respondents were in every sense of the word managers. They were employed as such and held and exercised the title, powers, duties, and responsibilities of a manager. They were known throughout the whole organization and in every branch community as such. They passed finally upon all the local problems of the branch that came up before them daily for decision. They ordered merchandise, fixed prices for sale of same, and had absolute authority over the many details of the business of the branch. They had full authority to employ and discharge such assistants as were necessary for the best interests of the branch, the home office holding the managers to a certain percentage of overhead and the managers had the authority to adjust salaries in such a way as would bring the best results. The manager was required to keep the operating expenses of his branch in California at not to exceed eight (8) per cent and at other places not to exceed twelve (12) per cent of the gross business done.

They kept or caused to be kept books of the branch making certain reports to the home office daily, semi-monthly, or monthly. They attended

to banking of receipts from sales and collections, and were responsible to the home office, their only superior located in San Francisco and in most cases hundreds of miles distant. In brief, they had all the responsibilities and performed all the duties of an ordinary proprietor of a store similar to and in competition with the branch. While they were expected to use any spare time in waiting on customers, arranging stock, and any other work which an ordinary proprietor of a similar store would do, these duties were only incidental to their duties as manager and were in nowise to interfere with such duties. The home office held them responsible not for so many hours work but for results through their operation of the branch. They were expected to make their branch prosper in competition with proprietors of similar stores who it is well known work long hours, perform incidental work to that of their proprietorship in order to earn a profit which usually is little more than a living for themselves and families. These managers when they were employed knew they were to perform similar duties and were willing to accept similar reward.

In conclusion, the best authorities hold that Congress in granting priority to the few named, intended to limit priority to these in exclusion of all others, or otherwise words of a general character would have been used. The facts show beyond the slightest doubt that these respondents were clothed with absolute powers, duties, and responsibilities customarily held by a manager or proprietor and

that they were paid for such in excess of the clerks who worked in the organization. To allow these managers, clothed with this authority, such priority, is in direct conflict with the opinion of this Court in the case of Blessing v. Blanchard and that the order of the District Court should be reversed.

Dated, San Francisco,  
May 7, 1923.

Respectfully submitted,  
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